A

SOORYA KUMAR NARAYANAN & ANOR

v.

PP

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
[CRIMINAL APPEALS NO: 05-149-2010(P)
C & 05-153-2010(P)]
5 NOVEMBER 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 197,246.9 grams of cannabis - Appellants arrested after*
D *loading sacks containing dangerous drug onto lorry - Control and custody - Possession - Presumption of knowledge under s. 37(d) - Sheer weight of drug - Whether supported inference of trafficking - PP v. Abdul Manaf Muhamad Hassan - Whether applicable - Whether distinguishable - Dangerous Drugs Act 1952, ss. 6, 37(d), 39A, 39B(1)(a)*

E

CRIMINAL PROCEDURE: *Defence - Dangerous drugs - Trafficking in 197,246.9 grams of cannabis - Appellants arrested after loading sacks containing dangerous drug onto lorry - Averment that sacks thought to contain smuggled batik clothes - Averment consistent with cautioned statement given to police - Whether defence properly weighed and*
F *considered - Conviction for trafficking - Whether sustainable - Dangerous Drugs Act 1952, ss. 6, 37(d), 39A, 39B(1)(a)*

The appellants were arrested and charged with trafficking in 197,246.9 grams of cannabis under s. 39B(1)(a) of the Dangerous
G Drugs Act 1952 ('DDA') read with s. 34 of the Penal Code, after a police ambush party saw them loading eight sacks of the proscribed drug onto a lorry at about 4.50am on 26 August 2000 at a river bank in Seberang Perai, Penang. It was not disputed that the drug was earlier ferried to the place by boat by people
H unknown. In their cautioned statement to the police, the appellants averred that they had been asked by one Babuji to collect smuggled batik clothes at the place, and that they thought what they were carrying and loading onto the lorry were batik clothes, and not dangerous drug. The trial judge, upon appraisal
I of the prosecution's evidence, ruled that the appellants had care and custody of the drug, but acknowledged that there was

nothing upon which an inference could be drawn that the appellants knew about the contents of the plastic sacks. The learned judge, nonetheless, had called for the defence after invoking the statutory presumption of knowledge (and therefore possession) under s. 37(d) DDA, and making an inference, based solely on the large quantity and weight of the drug, that the drug was for sale and not for personal consumption. In their defence, the appellants again denied any knowledge of the contents of the plastic sacks, and reiterated what they had said in their cautioned statement, namely that they thought that they were conveying batik clothes to the lorry. The learned judge however took the view that, without the evidence of Babuji, the cautioned statement was insufficient to rebut the presumption of knowledge under s. 37(d) DDA, and in the circumstances, rejected the defence and convicted the appellants as per the charge. The appellants appealed, but the appeal was dismissed by the Court of Appeal on grounds that the trial judge was correct in his finding of care and custody, reliance on s. 37(d) DDA in relation to the element of possession, and conclusion that the appellants' conduct was consistent with them knowing the contents of the plastic sacks. The appellants appealed further and argued before the apex court that both the courts below had fallen into error as: (i) there was no evidence to establish affirmatively the offence of trafficking against the appellants; (ii) the prosecution, if at all, had only proved a case of passive possession against the appellants; and (iii) it was not open for the trial judge to have inferred trafficking based solely on the weight of the drug. The prosecution retorted that it was permissible in law for the trial judge to have made the inference he did, citing in support thereof, the Federal Court in *PP v. Abdul Manaf Muhamad Hassan ('Manaf')*.

Held (allowing appeal; substituting conviction under s. 39B with one for possession under s. 6 read with s. 39A DDA)

Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) In law, it is permissible to make reasonable inferences if the facts and circumstances so warrant. However, in offences involving capital punishment such as drug trafficking, evidence by inference alone is not sufficient to base a conviction of the accused. (paras 26 & 27)

(2) This case is distinguishable from that of *Manaf* as, except for the large quantity of drug found, the circumstances when the drugs were found differed. In *Manaf*, the accused was travelling in a taxi when he was caught with the drug packed in small packets and tucked at his waist as well as inside the pockets of his track top and trousers, and therefore, it is reasonable and plain common sense to infer that the accused must have known of the existence of the drug. In the present case, the drug was found in bulk inside the plastic sacks, and the appellants merely loaded the plastic sacks onto the lorry. There was no evidence that they had the opportunity to open any of the plastic sacks to check their contents. The fact that each of the plastic sacks was heavy, and had to be dragged by the appellants from the river bank onto the back of the lorry, proved nothing. No evidence was adduced to show the comparable weight of one plastic sack of batik clothes, as to allow an inference that the apparent weight of the contents of the plastic sacks could not have been batik clothes as asserted by the appellants. (paras 28-30)

(3) At best, the appellants were caught while carrying the drug from the river bank onto the lorry. But the mere act of carrying is not sufficient to constitute the offence of trafficking. On the facts and in the circumstances of the case, the trial judge had therefore erred in making an inference of trafficking solely on the quantity and weight of drug found in the absence of the other facts such as found in *Manaf*'s case. If the judge did not make the inference, he would not have called for the appellants to enter their defence. (paras 28, 31 & 34

(4) The Court of Appeal, in upholding the decision of the trial judge, merely relied on the suspicious conduct and behavior of the appellants, but failed to note adequately the basic defence of the appellants as alluded to in the cautioned statement, namely that they were asked by one Babuji to pick up smuggled batik clothes. That is an illegal act no doubt and itself would involve the same suspicious conduct and behavior as seen in this case. As such, it was quite unreasonable for the trial judge and the Court of Appeal to come to such conclusion or inference as they did in this case, since the facts and circumstances could draw an inference of knowledge of either trafficking drug or smuggling batik clothes. (paras 32 & 33)

(5) There was no evidence adduced to warrant an affirmative finding of trafficking in this case. Indeed, if not for the invocation of the statutory presumption by the trial judge, he would have been unable to find *mens rea* possession on the part of the appellants. This is thus a proper case in which the preferred charge should have been reduced to one of possession at the end of the prosecution's case under s. 6 read with s. 39A of the DDA. (paras 36 & 38)

[Charge reduced accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu telah ditangkap dan dituduh dengan kesalahan mengedar 197,246.9 gram kanabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dibaca bersama s. 34 Kanun Keseksaan, setelah pasukan serang hendap polis melihat mereka memunggah lapan guni dadah terlarang berkenaan ke dalam sebuah lori pada lebih kurang jam 4.50 pagi 26 Ogos 2000 di tebing sebuah sungai di Seberang Perai, Pulau Pinang. Tidak dinafikan bahawa dadah sebelum itu telah dihantar ke situ dengan sebuah bot oleh orang-orang yang tidak diketahui. Dalam percakapan beramaran mereka kepada polis, perayu-perayu menyatakan bahawa mereka telah diminta oleh seorang Babuji untuk mengambil kain batik seludup di tempat tersebut, dan bahawa mereka percaya bahawa apa yang mereka punggah ke lori adalah kain-kain batik, dan bukannya dadah berbahaya. Hakim bicara, setelah meneliti keterangan pendakwaan, memutuskan bahawa perayu-perayu mempunyai jagaan dan kawalan, tetapi mengakui bahawa tiada apapun yang membolehkannya membuat inferens bahawa perayu-perayu mempunyai pengetahuan mengenai kandungan guni-guni plastik. Yang arif hakim bagaimanapun telah memanggil pembelaan, setelah menggunapakai anggapan statutori pengetahuan (dan oleh itu pemilikan) di bawah s. 37(d) ADB, dan membuat inferens, berdasarkan jumlah dan berat dadah, bahawa dadah adalah untuk dijual dan bukannya untuk penggunaan sendiri. Dalam pembelaan mereka, perayu-perayu sekali lagi menafikan sebarang pengetahuan mengenai kandungan guni-guni plastik, dan mengulangi apa yang mereka katakan dalam kenyataan beramaran mereka, iaitu bahawa mereka menyangka mereka memunggah kain-kain batik ke dalam lori. Yang arif hakim bagaimanapun berpendapat bahawa, tanpa keterangan Babuji, kenyataan beramaran adalah tidak cukup untuk

menolak anggapan pengetahuan di bawah s. 37(d) ADB, dan oleh yang demikian menolak pembelaan dan mensabitkan perayu-perayu sepertimana pertuduhan. Perayu-perayu merayu, namun rayuan mereka ditolak oleh Mahkamah Rayuan atas alasan bahawa hakim bicara betul dalam dapatannya mengenai jagaan dan kawalan, dalam kebergantungannya kepada s. 37(d) ADB berhubung elemen milikan, dan dalam keputusannya bahawa tingkah laku perayu-perayu adalah konsisten dengan mereka mengetahui kandungan guni-guni plastik. Perayu-perayu merayu seterusnya, dan berhujah di hadapan mahkamah tertinggi bahawa kedua-dua mahkamah di bawah khilaf kerana: (i) tiada keterangan afirmatif yang menunjukkan kesalahan mengedar terhadap perayu-perayu; (ii) jika adapun, pendakwaan hanya membuktikan kesalahan milikan terhadap perayu-perayu; dan (iii) adalah tidak terbuka untuk hakim bicara untuk membuat inferens pengedaran semata-mata berdasarkan berat dadah. Pihak pendakwaan menghujah balas bahawa hakim bicara boleh membuat inferens pengedaran seperti yang dibuatnya, dan sebagai sokongan mengemukakan keputusan Mahkamah Persekutuan di dalam *PP v. Abdul Manaf Muhamad Hassan ('Manaf')*.

Diputuskan (membenarkan rayuan; menggantikan sabitan di bawah s. 39B dengan sabitan milikan di bawah s. 6 dibaca bersama s. 39A ADB)

Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Di sisi undang-undang, membuat inferens yang munasabah adalah dibenarkan jika fakta dan hal keadaan kes mewajarkannya. Bagaimanapun, bagi kesalahan-kesalahan yang melibatkan hukuman mati seperti mengedar dadah, keterangan melalui inferens sahaja tidak mencukupi untuk dijadikan asas bagi mensabitkan seseorang tertuduh.

(2) Kes ini berbeza dengan kes *Manaf* kerana, kecuali dari segi banyaknya dadah yang dijumpai, hal keadaan di mana dadah dijumpai adalah berbeza. Di dalam *Manaf*, tertuduh sedang menaiki teksi bila ditangkap dan dadah dalam bungkusan-bungkusan kecil didapati terikat pada pinggangnya serta diletak di dalam poket kepala baju trek dan seluarnya, dan oleh itu, adalah jelas dan munasabah untuk mengandaikan bahawa tertuduh semestinya mengetahui mengenai kewujudan dadah.

Dalam kes semasa, dadah dijumpai di dalam guni plastik sementara perayu-perayu hanya membawa guni-guni plastik ke dalam lori. Tiada keterangan diberikan yang menunjukkan bahawa mereka berpeluang membuka guni-guni plastik untuk melihat isinya. Fakta bahawa setiap guni plastik adalah berat, dan perlu diheret oleh perayu-perayu dari tebing sungai ke lori tidak membuktikan apa-apa. Ini kerana tiada keterangan dikemukakan bagi menunjukkan berat satu guni plastik kain-kain batik secara perbandingan bagi membolehkan inferens dibuat bahawa berat kandungan guni plastik tersebut tidak mungkin mengandungi kain-kain batik seperti yang dihujahkan oleh pendakwaan.

(3) Pada tahapnya yang paling tinggi, perayu-perayu ditangkap ketika sedang membawa dadah dari tebing sungai ke lori. Tetapi, perbuatan membawa semata-mata tidak cukup untuk menjadikannya perbuatan mengedar. Berdasarkan fakta dan hal keadaan kes, hakim bicara khilaf apabila membuat inferens pengedaran semata-mata berdasarkan kuantiti dan berat dadah yang dijumpai dalam ketiadaan fakta-fakta lain seperti yang terdapat di dalam kes *Manaf*. Jika hakim tidak membuat inferens sedemikian, beliau tentunya tidak akan memanggil perayu-perayu untuk membela diri.

(4) Mahkamah Rayuan, dalam mengesahkan keputusan hakim bicara, hanya bergantung kepada kelakuan dan tingkah laku perayu-perayu, tetapi gagal mengambil kira secukupnya pembelaan asas perayu-perayu seperti yang dikatakan di dalam kenyataan beramaran, iaitu bahawa mereka diminta oleh seorang Babuji untuk mengambil kain batik seludup. Itu adalah satu perbuatan yang salah tentunya dan akan menarik kelakuan dan tingkah laku yang sama seperti yang terlihat dalam kes ini. Oleh itu, adalah agak tidak munasabah untuk hakim bicara dan Mahkamah Rayuan untuk mencapai rumusan atau inferens seperti yang mereka buat di sini kerana fakta-fakta dan hal keadaan kes boleh membangkitkan kedua-dua inferens pengetahuan pengedaran dadah atau pun penyeludupan kain batik.

(5) Tiada keterangan dikemukakan bagi mewajarkan dapatan afirmatif pengedaran di dalam kes ini. Malah, jika tidak disebabkan oleh penggunaan anggapan statutori oleh hakim

A bicara, beliau pasti tidak akan mampu merumuskan milikan *mens rea* di pihak perayu-perayu. Oleh itu, ini adalah suatu kes yang sesuai di mana pertuduhan yang dipilih harus diringankan kepada pertuduhan milikan di akhir kes pendakwaan di bawah s. 6 dibaca bersama s. 39A ADB.

B *[Pertuduhan diringankan sekadarnya.]*

Case(s) referred to:
Choo Chang Teik & Anor v. PP [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54 SC ***(refd)***
C *Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA* ***(refd)***
Mohamed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ong Ah Chuan v. PP And Another Appeal [1980] 1 LNS 181 PC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(dist)***

Legislation referred to:
D Courts of Judicature Act 1964, s. 60(1)
Dangerous Drugs Act 1952, ss. 6, 37(d), (da), 39A, 39B(1)(a),
Penal Code, s. 34

For the appellants - Gurbachan Singh (Bernard George with him); M/s Bachan & Kartar
E *For the respondent - Mangai; DPP*

[Editor's note: For the Court of Appeal judgment, please see Soorya Kumar Narayanan & Anor v. PP [2011] 4 CLJ 261.]

F *Reported by Wan Sharif Ahmad*

JUDGMENT

G **Richard Malanjum CJ (Sabah & Sarawak):**

Introduction

[1] The appellants are aggrieved by the decisions of the courts below. On a charge under s. 39B(1)(a) of the Dangerous Drugs
H Act 1952 (DDA) read with s. 34 of the Penal Code the trial High Court on 25 June 2007 convicted them of trafficking 197,246.9g of cannabis and sentenced them to death. The Court of Appeal dismissed their appeals against the conviction and sentence on 2 December 2010.

I

[2] We heard their appeals and we now render our judgment. A

Brief Background

[3] Based on information received on 26 August 2000 PW7 (Inspector Mohd Razi bin Ismail) organised a team consisting of six police officers and 24 police personnel to lay an ambush of an alleged drug trafficking activity near a bridge at Stadium Batu Kawan, Bukit Tambun, Seberang Perai, Pulau Pinang. B

[4] The team went to the location at around 4.30am and were divided into four groups. Each group took its respective position and waited for the event to happen as alleged in the information received. C

[5] At about 4.50am the team heard sound of a motor boat coming towards the river bank. Then soon after a lorry bearing registration no. WAX 4394 (later found to be a fake plate) entered the dirt road in a reversed manner and parked under the bridge. D

[6] Subsequently two persons alighted. They were the appellants. The 2nd appellant came out from the driver seat while the 1st appellant from the passenger side. Both then went to the river bank and collected eight plastic sacks dragging one at a time. They loaded the plastic sacks onto the lorry. Prior to that they unloaded some chairs that were originally on the rear of the lorry. After loading the plastic sacks the appellants loaded back the chairs and thereafter covered the rear of the lorry with canvass. E F

[7] As the appellants were about to leave the place the police team moved in to arrest them. They were arrested after a slight struggle. The motor boat managed to escape. It would appear that the police team did not prepare for it. G

[8] PW7 seized the plastic sacks and upon inspection he found each contained compressed slabs of dried plant materials suspected to be cannabis.

[9] The appellants together with the plastic sacks were then taken to the Pulau Pinang Police Contingent Headquarters for further investigation. H

[10] PW7 was also the investigation officer of this case. He, amongst other actions, caused the contents of the plastic sacks to be analysed by the chemistry department. I

[11] PW4 (Eliza binti Mat Nori) was the chemist who analyzed the contents. She found that they were cannabis with the total weight of 197,246.9g and a prohibited drug under the DDA.

Before The High Court

[12] At the end of the case for the prosecution the learned trial judge, having duly given the evidence adduced by the prosecution the maximum evaluation, found as a fact that the appellants were having care and custody of the drug. However to find that the appellants had knowledge of the drug in the plastic sacks, an essential ingredient for the element of possession, the learned trial judge relied on the presumption as provided under s. 37(d) of the DDA in that the appellants were presumed to have the knowledge that the plastic sacks contained the drug while they were in their care and custody.

[13] Having ruled that the appellants were in possession of the drug the learned trial judge went on to consider whether there was a *prima facie* case for the offence of trafficking. And based solely on the quantity of drug involved the learned trial judge inferred that the drug could not have been for personal consumption but for sale thus provided the element of trafficking. He therefore ruled that the prosecution had established a *prima facie* case against the appellants for drug trafficking and therefore called for their defence.

[14] In their defence both the appellants denied knowing that the plastic sacks contained drug. The 1st appellant said that he was told by one Babuji to go to the place to pick up smuggled batik clothes while the 2nd appellant testified that it was the 1st appellant who told him that the plastic sacks contained smuggled batik clothes.

[15] At the end of the whole case and having considered the evidence adduced both by the prosecution and the appellants the learned trial judge did not accept the version of the appellants. He ruled that the appellants failed to rebut on the balance of probability the presumption of knowledge as provided under s. 37(d) of the DDA. He also held that the appellants failed to cast any reasonable doubt in the prosecution's case while he was satisfied that the prosecution had established its case beyond reasonable doubt on the charge of drug trafficking by the appellants. His reasons for coming to his decision are as follows, *inter alia*;

(a) that the main defence of the appellants was lack of knowledge of the drug found in the plastic sacks. However, in view of the invocation of s. 37(d) of DDA the burden was on the appellants to rebut the presumption and the learned trial judge held that they failed to do so. He ruled that the cautioned statement of the 2nd appellant (D30) was not sufficient to rebut the presumption without the evidence of Babuji being the person claimed by the 1st appellant to have told him of the contents of the plastic sacks. He opined that the appellants should have called Babuji as a witness. The learned trial judge further ruled that no adverse inference should be drawn on the failure by the prosecution to call Babuji as a prosecution's witness;

(b) that the appellants went to the place in the early hour of the morning at about 3am;

(c) that the plastic sacks weighed at the average of 30 kilo each and thus too heavy to be batik clothes;

(d) that the plastic sacks were made of thin material;

(e) that the appellants attempted to run away when arrests were made;

(f) that the cautioned statement of the 2nd appellant (D30) could not be entirely relied upon to rebut the presumption due to the following discrepancies namely:

(i) in the cautioned statement the 2nd appellant said that the lorry was bought by Babuji while in his evidence in court he said that he was just a part time driver;

(ii) in the cautioned statement the 2nd appellant said that he was initially paid by Babuji RM500 for the work with a promise of another RM4,500 later on, yet nothing was said about payment in his evidence in court;

(iii) in the cautioned statement the 2nd appellant said that it was Babuji who gave him the telephone number of the 1st appellant and it was him who called the 1st appellant. However in his evidence in court the 2nd appellant denied knowing the telephone number of the 1st appellant and that it was the 1st appellant who called him; and

A (iv) in the cautioned statement the 2nd appellant said that the 1st appellant told him at Juru toll gate that the things to be picked up were smuggled goods while in his evidence in court he said that he was only told by the 1st appellant of the contents of the plastic sacks while they were
B carrying them.

[16] Accordingly the learned trial judge found the appellants guilty of the offence as charged and sentenced them to death.

C **Before The Court Of Appeal**

[17] In dismissing their appeals the Court of Appeal found that the learned trial judge was correct in his finding of care and custody of the drug and his reliance on the presumption of knowledge under s. 37(d) of DDA in relation to the element of
D possession.

[18] In respect of the charge for trafficking the Court of Appeal came to the following findings, namely:

E (a) that '(I)t was undeniable that the amount of cannabis seized was huge ie, about 197kg. No clever argument could convince us that the drug seized were for personal consumption (*Ong Ah Chuan v. PP And Another Appeal* [1980] 1 LNS 181; *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129). Basic common sense persuaded us that if that
F huge amount seized was not meant for personal consumption then it must be for the open market';

(b) that '(T)his case involves nothing short of an elaborate set-up and logically must be quite a costly enterprise. How could it not be as the evidence showed that the drug were
G ferried by a boat from some embarkation point and thereafter unloaded in the early hours of the day at the appointed place, and precisely about that time, a lorry comes along to assume responsibility? No less than four persons were involved in this operation too';

H (c) that '(T)he scenario of the evidence painted by the prosecution and strengthened by the appellant's testimony showed synchronization, professionalism and a well planned illegal act by them. The whole operation:

I (i) involved people from Kuala Lumpur and Penang;

(ii) was spiced with a dash of international element as the gunny sacks had Thai characters on them;

(iii) was efficiently undertaken as the whole exercise was completed in a short while;

(iv) took place very early in the morning ie, 4.50 am;

(v) the appellants knew the size of the drug as they brought a lorry along;

(vi) the registration number of WAX 4394 was a fake one. This was confirmed by SP6 when he said that the registration number was for a van (Ford Econoven) and not a lorry (Isuzu);

(vii) they must have pre-planned and timed their arrival with that of the two men in the boat;

(viii) they drove from the main road onto the track road in a reverse manner as if they knew the precise location where the boat would stop;

(ix) they unerringly halted and waited where the boat would berth as if they had done this before;

(x) they were well prepared as they used the furniture brought from Kuala Lumpur to hide the drug from prying eyes; and

(xi) they put up a struggle when arrested and in the course of which A1 was injured (*Parlan Dadeh v. PP* [2009] 1 CLJ 717; *Teng Howe Sing v. PP* [2009] 3 CLJ 733).

(d) that '(A)ll the above early preliminary acts, like meeting up at the Juru plaza toll, the preparatory acts, the overt conduct and the like, and the huge amount of cannabis seized confirmed that this was not a case of passive possession but outright trafficking';

(e) that '(W)ith the ingredients of knowledge (on a balance of probability), and trafficking (on reasonable doubt), unrebutted, we found that the prosecution had proven its case beyond reasonable doubt. We henceforth dismissed the appeals and affirmed the High Court orders'.

Before This Court

[19] Before us several grounds of appeal were submitted. However during the hearing, learned counsel for the appellants focused on the issue of knowledge. He contended that the appellants did not have the knowledge about the drug inside the

A plastic sacks. As such he submitted that at the highest there was only the offence of passive possession of the drug. He went on to say that there was no evidence adduced by the prosecution to establish affirmatively the offence of trafficking. And in this case it was necessary for the learned trial judge to make such affirmative
B finding of fact for trafficking since he could no longer rely on the presumption for trafficking under s. 37(da) of the DDA as he had already relied on s. 37(d) for presumed knowledge.

[20] It was further submitted that it was erroneous for the
C learned trial judge to solely rely on the weight of the drug to infer trafficking. Such exercise would tantamount to relying on the presumption for trafficking contrary to the established legal principle of prohibiting the use of double presumptions to find trafficking under the DDA. Learned counsel cited the case of
D *Mohamed Hassan v. PP* [1998] 2 CLJ 170.

[21] In response learned deputy public prosecutor submitted that it was correct for the learned trial judge to make an inference for trafficking based on the weight of drug found with the appellants. And it was also urged upon us that in view of the weight of the
E drug, plain common sense should dictate the existence of trafficking. Learned deputy also highlighted to us the provision of s. 60(1) of the Courts of Judicature Act 1964 (CJA) to maintain the conviction for trafficking since on the facts of this case no miscarriage of justice would occur.
F

[22] Now, as discussed above there is no dispute:

(a) that the drug found was cannabis, a class of prohibited drug under the DDA; and

G

(b) that the drug was in the care and custody of the appellants when they were arrested by the police.

[23] However, the learned trial judge acknowledged that there was no evidence upon which an inference could be made that the
H appellants must have known the contents of the plastic sacks. As such he relied on the statutory presumption under s. 37(d) of DDA. It means the appellants were presumed to have known about the drug found inside the plastic sacks unless they could prove to the contrary on the balance of probability.
I

[24] Having relied on the presumption of knowledge for the element of possession the learned trial judge then made an inference solely based on the large quantity and weight that the drug found was for sale and not for personal consumption. And on that score he called for the defence.

[25] Thus, in our view the first issue to consider is whether the learned trial judge was correct in law in making such an inference. Learned deputy argued that it is permissible in law and cited the case of *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129.

[26] We are inclined to agree with the learned deputy that in law it is permissible to make reasonable inferences if the facts and circumstances so warrant. Indeed this is what was said in *Manaf* case *(supra)* at p. 149:

> Judging from the manner the drug was being carried, ie, in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may drawn is that the respondent was in fact carrying it for the purpose of trafficking. And bearing in mind the large quantity of the drug involved, it cannot be seriously contended that the drug was for his own consumption.

[27] But at the same time it must also be borne in mind what was said by our then Supreme Court in the case of *Choo Chang Teik & Anor v. PP* [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54, at p. 59:

> We feel that in offences involving capital punishment such as trafficking in drug, evidence by inference alone was not sufficient to base a conviction of the appellant.

[28] Accordingly, having considered the facts and circumstances of this case, we are of the view that the learned trial judge should have been slow in making the inference of trafficking based solely on the quantity of drug found. This case can be distinguished from that of *Manaf* case *(supra)*. For instance, except for the large quantity of drug found in both cases, the circumstances when the drugs were found differed. In this case the drug was found in bulk inside the plastic sacks. In *Manaf* case *(supra)* the accused was travelling in a taxi when he was caught with the drug packed in small packets and tucked at his waist as well as inside the pockets of his track top and trousers.

[29] It is therefore reasonable and plain common sense to infer in *Manaf* case that the accused must have known of the existence of the drug and in view of the large quantity and the manner it was packed it could reasonably be inferred that it was for sale and thus satisfied the element of trafficking. In our view there were two factors considered in *Manaf* case *(supra)* that led this court to make the inference of trafficking, namely, 'the manner the drug was being carried' and 'the total amount of the drug involved'.

[30] But the same cannot be said in the present case. The appellants merely loaded the plastic sacks onto the lorry. There was no evidence that they had the opportunity to open any of the plastic sacks to check their contents. Meanwhile, each of the plastic sacks must have been heavy since each had to be dragged by the appellants from the river bank onto the back of the lorry. But such fact proves nothing. No evidence was adduced to show the comparable weight of one plastic sack of batik clothes so as to allow an inference that the apparent weight of the contents of the plastic sacks could not have been batik clothes as asserted by the appellants.

[31] At best therefore is that the appellants were caught while carrying the drug from the river bank onto the lorry. And it was said in *Manaf* case and which we agree that 'the mere act of carrying is not sufficient to constitute the offence of trafficking'.

[32] We have also considered the views expressed by the Court of Appeal in upholding the decision of the learned trial judge. With respect, they merely relied on the suspicious conduct and behavior of the appellants while failing to note adequately the basic defence of the appellants alluded to in the cautioned statement (D30), namely that they were asked by one Babuji to pick up smuggled batik clothes, an illegal act no doubt and itself would likely involve the same suspicious conduct and behavior as seen in this case.

[33] As such it was quite unreasonable for the learned trial judge and the Court of Appeal to come to such conclusion or inference as they did in this case since the facts and circumstances could draw an inference of knowledge of either trafficking drug or smuggling batik clothes.

[34] Thus, in our view on the facts and circumstances of this case the learned trial judge erred in making an inference of trafficking solely on the quantity and weight of drug found in the absence of the other facts such as found in *Manaf* case *(supra)*. If the learned trial judge did not make the inference he would not have called for the appellants to enter their defence on the charge preferred. Indeed in *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65 the Court of Appeal said this at p. 75:

> To summarise, the fact that the accused is transporting a quantity of drug from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drug and any transaction the accused proposed to enter into.

[35] Even if the defence was called the version of the appellants should not have been simply brushed aside as done in this case. It should be noted that they did state at the first opportunity available in the form of the cautioned statement (D30) that it was a person by the name of Babuji who asked them to go to the place to pick up smuggled batik clothes. Thus, it is difficult to say that such assertion was an afterthought.

[36] We are therefore inclined to agree with the contention of learned counsel for the appellants that there was no evidence adduced to warrant an affirmative finding of trafficking in this case. Indeed if not for the invocation of the statutory presumption by the learned trial judge he would have been unable to find *mens rea* possession on the part of the appellants.

[37] Learned deputy also urged us to consider the provision of s. 60 of CJA as was done in *Manaf* case *(supra)*. With respect, the facts and circumstances of this case do not justify such invocation. To do so would more likely occasion injustice to the appellants.

[38] Accordingly we are of the view that this is a proper case in which the preferred charge should have been reduced to one of mere possession at the end of the case for the prosecution under s. 6 of DDA read with s. 39A of the same Act.

A **[39]** We therefore set aside the conviction of the appellants for trafficking under s. 39B of DDA and substitute it with one of possession under s. 6 read with s. 39A of DDA. We also set aside the sentence passed against the appellants. We now call for their mitigation before we consider the appropriate punishment to
B impose against them.

C

D

E

F

G

H

I